

APPENDIX D TO DIR CONTRACT NO. DIR-SDD-1727
BMC SUBSCRIPTION SERVICES AGREEMENT

This BMC SUBSCRIPTION SERVICES AGREEMENT ("**Agreement**") is entered into as a supplemental agreement, and is effective as of _____ ("**Agreement Effective Date**") between:

BMC: BMC Software, Inc., a Delaware corporation, located at 2101 CityWest Blvd., Houston, Texas 77042-2827; and

Customer: _____.

1. DEFINITIONS.

- 1.1 "**Affiliate**" is an entity that controls, is controlled by or shares common control with BMC or Customer, where such control arises from either (a) a direct or indirect ownership interest of more than 50% or (b) the power to direct or cause the direction of the management and policies, whether through the ownership of voting stock by contract, law or otherwise, equal to that provided by a direct or indirect ownership of more than 50%.
- 1.2 "**BMC Subscription Services**" means the hosted service which packages web-based access and the right-to-use the supported applications and associated reference, user and technical guides. One or more of BMC's subscription services offerings may be ordered pursuant to the terms of this Agreement.
- 1.3 "**Additional Services**" means the service(s) named and described in an Order for the purchase of such Additional Service.
- 1.4 "**Customer Data**" means all electronic data or information submitted by Customer to the BMC Subscription Services.
- 1.5 "**Order**" means (i) the agreed ordering document for the purchase of the Services, (ii) that is subject to this Agreement, and (iii) that identifies the particulars of the purchase and fees to be paid.
- 1.6 "**User**" means individuals (i) who are authorized by Customer to use and access the BMC Subscription Services, (ii) for whom subscriptions to the BMC Subscription Services have been purchased, and (iii) who have been assigned unique user identifications and passwords by Customer.
- 1.7 "**End User**" means individuals (i) who are authorized by Customer to use and access the BMC Subscription Services, (ii) for the limited purpose of approving and requesting within the BMC Subscription Services, and (iii) who have been assigned a unique user identification and password by Customer. Paid subscriptions are not required to be purchased for End Users.
- 1.8 "**All Users**" means the sum of the Users and End Users. All Users may include employees, consultants, contractors and agents of Customer or its Affiliates.

2. **SCOPE.** Subject to Customer's payment of applicable fees, BMC will provide Customer with access to BMC's Subscription Service and with the Additional Services (together, the "**Services**") as set forth in this Agreement and the applicable Order. This Agreement contemplates the execution by the parties of one or more Orders. Orders may be entered under this Agreement by and between (a) BMC or an Affiliate of BMC; and (b) the Customer or an Affiliate of Customer. With respect to an Order, the terms "BMC" and "Customer" as used in this Agreement will be deemed to refer to the entities that execute that Order, the Order will be considered a two party agreement between such entities, and BMC will separately invoice the Customer named in the Order for the associated subscription fees. Neither execution of this Agreement, nor anything contained herein, shall obligate either party to enter into any Orders.

3. BMC SUBSCRIPTION SERVICES.

3.1 Access Rights. Subject to the terms of this Agreement, BMC hereby grants to Customer a worldwide, non-exclusive, non-transferable, non-sublicenseable, limited license for All Users to access and use the BMC Subscription Services in accordance with the terms of this Agreement, solely in connection with the operation of the business of Customer. Customer is responsible for All Users' compliance with this Agreement.

3.2 Users. The number of Users for which a subscription is being purchased will be set forth in an Order. User subscriptions are for designated Users and cannot be shared or used by more than one User but may be re-designated to new Users replacing former Users who no longer require ongoing use of the BMC Subscription Services. However, such re-designation may not be used to circumvent limitations on sharing User subscriptions. Unless otherwise specified in the relevant Order, (i) additional User subscriptions may be added in minimum increments of 1; (ii) the term of the additional User subscriptions shall be coterminous with the expiration of the subscription term in effect at the time the additional Users are added; and (iii) pricing for the additional User subscriptions shall be prorated for the remainder of the subscription term in effect at the time the additional Users are added.

3.3 BMC Responsibilities. BMC will (i) provide the BMC Subscription Services in a manner consistent with general industry standards reasonably applicable to the provision thereof; (ii) use commercially reasonable efforts to maintain the security of Customer passwords; (iii) provide the support described at <http://www.bmc.com/support/review-policies> ("**Support**") to Customer for the BMC Subscription Services, which may be changed by BMC upon prior notice to customer. There is no service level agreement ("**SLA**") provided with the BMC Subscription Services, unless stated in the Order with the terms of the SLA attached to the Order.

3.4 Customer Responsibilities and Restrictions. (a) Except for BMC's obligations in Section 3.3, Customer will be responsible for maintaining the confidentiality of the passwords assigned to Customer. Customer will immediately notify BMC if it becomes aware that a password is lost, stolen, disclosed to an unauthorized third party, or otherwise compromised. Customer will be responsible for any and all activities made under Customer's account, including without limitation any fees incurred under Customer's password-protected account. Customer will (i) use commercially reasonable efforts to prevent unauthorized access to, or use of, the BMC Subscription Services, and notify BMC promptly of any such unauthorized access or use, (ii) comply with all applicable laws in using the Services. (b) Customer and All Users will not (i) modify, copy or create derivative works based on the Services; (ii) create Internet "links" to or reproduce any content forming part of the BMC Subscription Services, other than for its own internal business purposes; (iii) disassemble, reverse engineer, or decompile the BMC Subscription Services or part thereof, or access it in order to copy

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any ideas, features, content, functions or graphics of the BMC Subscription Services; (iv) interfere with or disrupt the integrity or performance of the BMC Subscription Services; (vi) send or store infringing, obscene, threatening, libelous, or otherwise unlawful or tortuous material via the BMC Subscription Services; (vii) send or store viruses or malicious code via the BMC Subscription Services; (viii) attempt to gain unauthorized access to the BMC Subscription Services or its related software, systems, platforms or networks; or (ix) use any components provided with the Services separately from the Services.

3.5 System Notifications. Customer will receive system notifications from BMC and its licensors, if applicable (i.e. planned downtime notices, etc).

3.6 Additional Services. Customer may purchase Additional Services via an Order available through DIR Contract No. DIR-SDD-1727. BMC offers other custom services which may be ordered pursuant to a separate BMC Master Services Agreement and statement of work. For purposes of clarity, such services may not be ordered under this Agreement.

4. FEES AND PAYMENT.

4.1 Fees. The fees payable for the Services will be set forth in the Order. The fees will be invoiced in accordance with the relevant Order and are due in accordance with Chapter 2251, Texas Government Code.

4.2 Taxes. Taxes shall be in accordance with Section 4.F. of DIR Contract No. DIR-SDD-1727.

4.3 Suspension of BMC Subscription Services. In addition to its other rights and remedies, BMC reserves the right, without liability to the Customer, to suspend any and all access to the BMC Subscription Services if Customer's account becomes more than thirty (30) days past due until all accounts are paid in full. The unpaid balance of each late payment bears interest at a rate equal to the lesser of 1% per month or the maximum amount permitted by law.

5. TERM AND TERMINATION.

5.1 Term. (a) Agreement. This Agreement commences on the Effective Date and will remain in effect unless terminated pursuant to Section 5.2 below.

(b) Order(s). Each Order will commence on the start date specified in the relevant Order and continue for the subscription term specified therein.

5.2 (a) Termination for Convenience. Upon thirty (30) days advance written notice, either party may terminate this Agreement for its convenience; however, such termination will have no effect on Orders executed by the parties prior to its effective date, including but not limited to payment obligations contained therein, and such Orders will remain in full force and effect under the terms of this Agreement;

(b) Termination for Cause. Either party may terminate this Agreement for cause: (i) upon thirty (30) days written notice of a material breach to the other party if such breach remains uncured at the expiration of such period; or (ii) immediately if the other party becomes the subject of a petition in bankruptcy or any other proceeding relating to insolvency, receivership, liquidation or assignment for the benefit of creditors.

(c) Suspension of Services for Cause. In addition to its other rights and remedies, BMC reserves the right, without liability to Customer, to immediately suspend any and all access to the Services if Customer commits a material breach of this Agreement or any relevant Order until such material breach is cured. If such material breach is (i) unable to be cured, or (ii) is not cured within 10 business days, then BMC may immediately terminate the Agreement and/or the affected Order.

(d) Termination for Non-Appropriation. Customer may terminate this Agreement if funds sufficient to pay its obligations under the Agreement are not appropriated by the Texas legislature for state agencies or the governing body of a non-state agency Customer. In the event of non-appropriation, BMC will be provided ten (10) calendar days written notice of intent to terminate. The Agreement shall end at the end of the Customer's then-current fiscal year in the event of non-appropriation, without recourse against Customer. The acceptance of the end of the Customer's then-current fiscal year is the exclusive remedy to the Vendor.

5.3 Effects of Termination. Upon termination pursuant to 5.2(b) through (d) above, all rights and licenses granted herein will terminate and Customer will make no further use of the Services. Except as provided under 5.2 (d) above, no termination will relieve the Customer of the obligation to pay any fees accrued or payable to BMC. Upon written request by Customer made within thirty (30) days after the effective date of termination, BMC will make available to Customer a file containing the Customer Data. After such thirty day period, BMC shall have no obligation to maintain or provide any Customer Data and will thereafter delete Customer Data.

6. PROPRIETARY RIGHTS AND CONFIDENTIALITY.

6.1 Proprietary Rights. BMC, its Affiliates or licensors retain all right, title and interest to the Services and all related intellectual property and proprietary rights. The Services are protected by applicable copyright, trade secret, industrial and other intellectual property laws. BMC owns all right, title and interest in all software, programming, documentation, templates, questionnaires, methodologies, models, charts, reports and any other items used to deliver the Services or made available to Customer as a result of the Services ("**Services Items**") and access to and use of the relevant Services Items will be governed by the terms of this Agreement. BMC reserves any rights not expressly granted to Customer. "**Confidential Information**" means, to the extent consistent with the Texas Public Information Act, all proprietary or confidential information that is disclosed to the recipient ("**Recipient**") by the discloser ("**Discloser**"), and includes, among other things (i) any and all information relating to products or services provided by a Discloser, its customer-related and financial information, software code, flow charts, techniques, specifications, development and marketing plans, strategies, and forecasts; and (ii) as to BMC, and its licensors, the Services. Confidential Information does not include information

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that Recipient can show: (a) was rightfully in Recipient's possession without any obligation of confidentiality before receipt from the Discloser; (b) is or becomes a matter of public knowledge through no fault of Recipient; (c) is rightfully received by Recipient from a third party without violation of a duty of confidentiality; (d) is or was independently developed by or for Recipient, or (e) is required to be disclosed pursuant to the Texas Public Information Act. Recipient may not disclose Confidential Information of Discloser to any third party or use the Confidential Information in violation of this Agreement. The Recipient (i) will exercise the same degree of care and protection with respect to the Confidential Information of the Discloser that it exercises with respect to its own Confidential Information and (ii) will not, either directly or indirectly, disclose, copy, distribute, republish, or allow any third party to have access to any Confidential Information of the Discloser. Notwithstanding the foregoing, Recipient may disclose Discloser's Confidential Information to Recipient's employees and agents who have need to know provided that such employees and agents have legal obligations of confidentiality substantially the same (and in no case less protective) as the provisions of this Agreement.

6.2 Notification Obligation. If the Recipient becomes aware of any unauthorized use or disclosure of Discloser's Confidential Information, then Recipient will promptly and fully notify the Discloser of all facts known to it concerning such unauthorized use or disclosure. In addition, if the Recipient or any of its employees or agents are required (by oral questions, interrogatories, requests for information, or documents in legal proceedings, subpoena, civil investigative demand, or other similar process) to disclose any of Discloser's Confidential Information, the Recipient will not disclose the Discloser's Confidential Information without providing the Discloser with commercially reasonable advance prior written notice. BMC reserves the right to seek a protective order or other appropriate remedy to preserve the confidentiality of the Discloser's Confidential Information.

6.3 Customer Data. As between BMC and Customer, Customer owns all rights, title and interest in and to Customer Data. Customer Data is deemed Confidential Information under this Agreement. Customer is responsible for complying with all legal requirements, including applicable privacy laws and regulations, relating to the collection, use, processing and transfer of Customer Data. Customer acknowledges and consents that Services provided may require Customer Data to be transferred to a country outside of Customer's country or the country where the Customer Data originated.

6.4 Suggestions. Customer agrees that BMC shall have a royalty-free, worldwide, transferable, sublicenseable, irrevocable, perpetual license to use or incorporate into any BMC products or services any suggestions, enhancement requests, recommendations or other feedback provided by Customer or Users relating to the Services.

7. DISCLAIMERS AND LIMITS ON LIABILITY.

7.1 Disclaimer. CUSTOMER ACKNOWLEDGES THAT, EXCEPT AS OTHERWISE EXPRESSLY PROVIDED HEREIN, BMC, ITS AFFILIATES AND LICENSORS MAKE NO WARRANTY, EXPRESS, IMPLIED OR STATUTORY WITH RESPECT TO THE SERVICES OR USE THEREOF. BMC, ITS AFFILIATES AND LICENSORS HEREBY EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY THAT SERVICES WILL BE UNINTERRUPTED, ERROR FREE OR WITHOUT DELAY, AND THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INTERFERENCE, NON-INFRINGEMENT AND INFORMATION CONTENT.

7.2 DISCLAIMER OF DAMAGES. EXCEPT FOR A BREACH OF SECTION 3.4 AND EACH PARTY'S RESPONSIBILITIES IN SECTION 8, NEITHER PARTY OR ITS AFFILIATES ARE LIABLE FOR ANY SPECIAL, INDIRECT, INCIDENTAL, PUNITIVE OR CONSEQUENTIAL DAMAGES RELATING TO OR ARISING OUT OF THIS AGREEMENT OR THE SERVICES (INCLUDING, WITHOUT LIMITATION, LOST PROFITS, LOST COMPUTER USAGE TIME, AND DAMAGE TO, OR LOSS OF USE OF, DATA), EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, AND IRRESPECTIVE OF ANY NEGLIGENCE OF A PARTY OR WHETHER SUCH DAMAGES RESULT FROM A CLAIM ARISING UNDER TORT OR CONTRACT LAW.

7.3 LIMITS ON LIABILITY. EXCEPT FOR A BREACH OF SECTION 3.4 AND EACH PARTY'S RESPONSIBILITIES IN SECTION 8, NEITHER PARTY OR ITS AFFILIATES SHALL HAVE AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE SERVICES, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, EXCEEDING THE LESSER OF \$500,000 OR THE AMOUNTS ACTUALLY PAID BY AND DUE FROM CUSTOMER PURSUANT TO THE ORDER(S) GIVING RISE TO LIABILITY.

8. INFRINGEMENT CLAIMS.

8.1 Indemnification by BMC. BMC shall indemnify the State of Texas and Customer, and/or their employees, agents, representatives, contractors, and/or assignees, from all third party claims involving infringement of United States patents, copyrights, trade and service marks, and any other intellectual or intangible property rights in connection with the services performed by BMC pursuant to this Agreement. BMC and the Customer agree to furnish timely written notice to each other of any such claim. Vendor shall be liable to pay all costs of defense including attorney's fees. The Defense shall be coordinated by the Office of Attorney General for the State of Texas.

If BMC becomes aware of an actual or potential claim, or Customer provides BMC with notice of an actual or potential claim, BMC may (or in the case of an injunction against Customer, shall), at BMC's sole option and expense: (i) procure for the Customer the right to continue to use the affected portion of the product or service, or (ii) modify or replace the affected portion of the product or service with functionally equivalent or superior product or service so that Customer's use is non-infringing and if (i) or (ii) are not commercially reasonable, terminate Customer's right to use the Services and issue a pro-rata refund for the unexpired pre-paid portion of such Services.

8.2 Independent contractor. BMC agrees and acknowledges that during the existence of this Agreement, it is furnishing

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services in the capacity of an independent contractor and that BMC is not an employee of the State of Texas or of any Customer.

9. **EXPORT CONTROLS.** Customer will cooperate with BMC as reasonably necessary to ensure compliance with the laws and regulations of the United States and all the relevant countries, relating to exports (including "deemed" exports and "deemed" re-exports as defined by the Export Administration Regulations) and re-exports ("**Export Laws**"). Customer may not import, export, re-export or transfer, directly or indirectly, including via remote access, any part of the Services or any other BMC information or technology in violation of any such laws and regulations, or without any written governmental authorization required under applicable laws. In particular, but without limitation, none of the software or the underlying information or technology may be downloaded or otherwise exported or re-exported, directly or indirectly, (a) into (or to a national or resident of) any country to which the United States government has imposed trade sanctions denying the export of any products; (b) to anyone on the US Treasury Department's list of Specially Designated Nationals or Other Blocked Persons, the US Commerce Department's Denied Parties List, the US Commerce Department's Entity List, or the US Commerce Department's Unverified List; or (c) to or for any proliferation-related (nuclear weapons, missile technology, or chemical/biological weapons) end use.

10. **GOVERNING LAW.** This Agreement is governed by the substantive laws in force, without regard to conflict of laws principles, in the State of Texas. Venue shall lie in the state courts of Travis County, Texas. Nothing herein shall be construed to waive the sovereign immunity of the State of Texas.

11. **U.S. FEDERAL ACQUISITIONS.** This Article applies to all acquisitions of the commercial product and/or services subject to this Agreement by or on behalf of the U.S. Federal Government (the "Government"), or by any prime contractor or subcontractor (at any tier) under any contract, grant, cooperative agreement or other activity with the Government. By accepting delivery of the product and/or service, the Government hereby agrees that the product and or service qualifies as "commercial" within the meaning of the acquisition regulation(s) applicable to this procurement. The terms and conditions of this Agreement shall pertain to the Government's use and disclosure of the product and/or service, and shall supersede any conflicting contractual terms and conditions. If the license granted by this Agreement fails to meet the Government's needs or is inconsistent in any respect with U.S. Federal law, the Government agrees to return the product, unused, to BMC. The following additional statement applies only to acquisitions governed by DFARS Subpart 227.4 (October 1988): "Restricted Rights – Use, duplication and disclosure by the Government is subject to restrictions as set forth in subparagraph (c)(1)(ii) of the Rights in Technical Data and Computer Software clause at DFARS 252.227-7013 (Oct. 1988)."

12. **MISCELLANEOUS TERMS.** BMC is not liable for its failure to perform any of its obligations under this Agreement during any period in which performance is delayed by Customer or circumstances beyond BMC's reasonable control. The parties are independent contractors and this Agreement does not create a partnership, franchise, joint venture, agency, fiduciary, or employment relationship between the parties. Orders for BMC Subscription Services shall be placed under DIR-SDD-1727 and this Agreement, including any Exhibits and Orders constitutes the entire agreement between Customer and BMC and supersedes any prior or contemporaneous negotiations or agreements, whether oral or written concerning the Services. There are no third party beneficiaries to this Agreement; Customer is not entering into a contractual relationship with BMC's licensors and BMC's licensors have no liability to Customer. No modification or waiver of any provision hereof will be effective unless made in a writing signed by both BMC and Customer. Assignments shall be in accordance with Section 4.D of Appendix A of the DIR Contract No. DIR-SDD-1727. Should any provision of this Agreement be invalid or unenforceable, the remainder of the provisions will remain in effect. Any additional or conflicting terms of any Customer purchase order are rejected by BMC and do not apply.

This Agreement is effective only upon execution by BMC and Customer. Each party hereto warrants and represents that this Agreement constitutes the legal, valid and binding obligation of such party as of the Effective Date.

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BMC SOFTWARE, INC.

Signature: _____

Name: _____

Title: _____

Date: _____

CUSTOMER

Signature: _____

Name: _____

Title: _____

Date: _____

Legal: _____